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No. 97-156

In the Supreme Court of the United States

OCTOBER TERM, 1997

RANDON BRAGDON, PETITIONER

v.

SIDNEY ABBOTT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether reproduction is a "major life activit[y]" under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*

2. Whether asymptomatic individuals infected with HIV are *per se* disabled within the meaning of the ADA.

3. Whether courts must defer to a dentist's professional judgment in determining whether performing a routine dental procedure on a patient infected with HIV poses a direct threat to the health or safety of that dentist or others, under 42 U.S.C. 12182(b)(3).

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statutory and regulatory provisions involved	2
Statement	2
Summary of argument	8
Argument:	
I. Asymptomatic HIV infection is a "disability" under the Americans with Disabilities Act	10
A. Reproduction is a "major life activity" under the ADA	11
B. HIV infection "substantially limits" respondent's major life activity of reproduction	16
II. An asymptomatic HIV-infected patient does not pose a "direct threat" to dental health care workers following universal precautions when performing routine dental care	24
Conclusion	30
Appendix	1a

TABLE OF AUTHORITIES

Cases:

American Dental Ass'n v. *Martin*, 984 F.2d 823 (7th Cir.), cert. denied, 510 U.S. 859 (1993)	2, 29
Anderson v. *Gus Mayer Boston Store*, 924 F. Supp. 763 (E.D. Tex. 1996)	17
Austin v. *Pennsylvania Dep't of Corrections*, 876 F. Supp. 1437 (E.D. Pa. 1995)	19
Baxter v. *City of Belleville*, 720 F. Supp. 720 (S.D. Ill. 1989)	19
Berk v. *Bates Advertising USA, Inc.*, No. 94 Civ. 9140 (CSH), 1997 WL 749386 (S.D.N.Y. Dec. 3, 1997)	15

Cases—Continued: Page

Bielicki v. *City of Chicago*, No. 97 C 1471, 1997 WL 260595 (N.D. Ill. May 8, 1997) 15
Bradley v. *University of Texas M D. Anderson Cancer Ctr.*, 3 F.3d 922 (5th Cir. 1993), cert. denied, 510 U.S. 1119 (1994) 29
Cain v. *Hyatt*, 734 F. Supp. 671 (E.D. Pa. 1990) 15, 19, 23
Chalk v. *United States Dist. Ct.*, 840 F.2d 701 (9th Cir. 1988) 25, 26
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 10
Cortes v. *McDonald's Corp.*, 955 F. Supp. 541 (E.D.N.C. 1996) 15, 22
Doe v. *District of Columbia*, 796 F. Supp. 559 (D.D.C. 1992) 15, 19
Doe v. *Garrett*, 903 F. 2d 1455 (11th Cir. 1990), cert. denied, 499 U.S. 904 (1991) 19
Doe v. *Kohn, Nast & Graf, P.C.*, 862 F. Supp. 1310 (E.D. Pa. 1994) 15
Doe v. *University of Maryland Med. Sys Corp.*, 50 F.3d 1261 (4th Cir. 1995) 29
Eisenstadt v. *Baird*, 405 U.S. 438 (1972) 12
Ennis v. *National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55 (4th Cir. 1995) 17
Erickson v. *Board of Governors*, 911 F. Supp. 316 (N.D. Ill. 1995) 15
Gates v. *Rowland*, 39 F.3d 1439 (9th Cir. 1994) 19
Glanz v. *Vernick*, 756 F. Supp. 632 (D. Mass. 1991) 19
Hernandez v. *Prudential Ins. Co.*, 977 F. Supp. 1160 (M.D. Fla. 1997) 15, 22
Hoepfl v. *Barlow*, 906 F. Supp. 317 (E.D. Va. 1995) 22
Krauel v. *Iowa Methodist Medical Ctr.*, 915 F. Supp. 102 (S.D. Iowa 1995), aff'd, 95 F.3d 674 (8th Cir. 1996) 15

Cases—Continued: Page

Leckelt v. *Board of Comm'rs of Hosp. Dist. No. 1*, 714 F. Supp. 1377 (E.D. La. 1989), aff'd, 909 F.2d 820 (5th Cir. 1990) 19, 29
McWright v. *Alexander*, 982 F.2d 222 (7th Cir. 1992) 15
Pacourek v. *Inland Steel Co.*, 916 F. Supp. 797 (N.D. Ill. 1996) 13, 15
Planned Parenthood v. *Casey*, 505 U.S. 833 (1992) 8, 12
Ray v. *School Dist. of Desoto County*, 666 F. Supp. 1524 (M.D. Fla. 1987) 19
Rivera v. *Heyman*, No. 96 Civ. 4489 (PKL), 1997 WL 620837 (S.D.N.Y. Oct. 7, 1997) 15
Runnebaum v. *Nationsbank of Maryland*, 123 F.3d 156 (4th Cir. 1997) 15, 23
School Bd. of Nassau County v. *Arline*, 480 U.S. 273 (1987) 14, 15, 18, 24, 25, 29
Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 12
Soodman v. *Wildman, Harrold, Allen & Dixon*, No. 95 C 3834, 1997 WL 106257 (N.D. Ill. Feb. 10, 1997) 15
Stanley v. *Illinois*, 405 U.S. 645 (1972) 12
State v. *Clausen*, 491 N.W.2d 662 (Minn. Ct. App. 1992) 17
Sutton v. *United Air Lines, Inc.*, 130 F.3d 893 (10th Cir. 1997) 18
Thomas v. *Atascadero Unified Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal. 1987) 15, 19
United States v. *Board of Comm'rs*, 435 U.S. 110 (1978) 22
United States v. *Castle*, No. H-93-3140 (S.D. Tex. Sept. 22, 1994) 1
United States v. *Morvant*, 898 F. Supp. 1157 (E.D. La. 1995) 1
Zatarain v. *WDSU-Television, Inc.*, 881 F. Supp. 240 (E.D. La. 1995), aff'd, 79 F.3d 1143 (5th Cir. 1996) 15

Statutes and regulations: Page

Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.* 1, 2
42 U.S.C. 12101(a)(7) 18
42 U.S.C. 12102(2) 5, 1a
42 U.S.C. 12102(2)(A) 10
42 U.S.C. 12102(2)(C) 11, 23
Americans with Disabilities Act, Tit. III, 42 U.S.C. 12181 *et seq.* 4
42 U.S.C. 12182 4
42 U.S.C. 12182(a) 10
42 U.S.C. 12182(b)(3) 6, 24, 29
42 U.S.C. 12186(b) 2, 10, 1a
42 U.S.C. 12188(b) 1
Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111, 88 Stat. 1619, 29 U.S.C. 706 19
28 C.F.R.:
Pt. 36:
Section 36.104 ..... 2, 5, 12, 13, 1a
Section 36.104(1)(i) 10
Section 36.104(1)(iii) 11
Section 36.208 ..... 2, 3a
Section 36.208(a) 3a
Section 36.208(b) 3a
Section 36.208(c) 7, 25, 28, 4a
App. B 2, 4a
§ 36.104 ..... 16, 17, 18, 21, 23
§ 36.208 ..... 24, 25
29 C.F.R.:
Section 1630 App.:
§ 1630.2(j) 18
Section 1910.1030 3
45 C.F.R. 84.3(j)(2)(ii) 13

Miscellaneous:

Myron S. Cohen, *HIV and Sexually Transmitted Diseases*, 98 Postgraduate Medicine 52 (1995) 17

Miscellaneous—Continued: Page

H.R. Rep. No. 485, 101st Cong., 2d Sess. (1990):
Pt. 2 ..... 21, 23, 24, 25
Pt. 3 ..... 21, 24, 25
Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), *reprinted in Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. (1989) 19-20
S. Rep. No. 116, 101st Cong., 1st Sess. (1989) 21, 23

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INTEREST OF THE UNITED STATES

This case raises important questions regarding the application of the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.* (ADA), to individuals infected with the Human Immunodeficiency Virus (HIV). The Attorney General has statutory authority to enforce the ADA's public accommodations provisions, see 42 U.S.C. 12188(b), pursuant to which the United States has brought two lawsuits seeking to apply the ADA in circumstances virtually identical to those present here.[1] The Department of Justice has also issued extensive regulations and interpretive guidance concerning two of the key provisions at issue in this case: the definition of the term "disability" and the proper application of the "direct threat" exception under

[1] See *United States* v. *Castle*, No. H-93-3140 (S.D. Tex.) (consent decree dated Sept. 22, 1994); *United States* v. *Morvant*, 898 F. Supp. 1157 (E.D. La. 1995) (summary judgment for the United States).

the ADA. See 42 U.S.C. 12186(b); 28 C.F.R. 36.104, 36.208; 28 C.F.R. Pt. 36 App. B.

The United States has additional interests in this case. The Centers for Disease Control and Prevention (CDC) have issued recommended infection control practices for dentistry, which have been largely incorporated in an Occupational Safety and Health Administration rule regarding exposure to bloodborne pathogens. See generally *American Dental Ass'n* v. *Martin*, 984 F.2d 823 (7th Cir.), cert. denied, 510 U.S. 859 (1993). Moreover, the then-Director of the CDC's Division on Oral Health testified in this case to the CDC's position that persons infected with HIV may be safely treated in a private dental office if universal precautions are employed. The United States has a substantial interest in the deference to be accorded to those judgments. For all these reasons, the United States participated in this case as amicus curiae in both the district court and the court of appeals.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant portions of the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, and of the regulations promulgated by the Attorney General pursuant to the Act are reproduced at Appendix, *infra*, 1a-8a.

STATEMENT

Petitioner is a dentist with a practice in Bangor, Maine. This case arises from his refusal to provide routine dental treatment to respondent Sidney Abbott, solely because Ms. Abbott is infected with the Human Immunodeficiency Virus (HIV).

1. HIV is the virus that causes Acquired Immune Deficiency Syndrome (AIDS). Pet. App. 31a. "People exposed to HIV may contract the virus, and if so, will develop HIV antibodies and become HIV positive." *Ibid.* HIV disease compromises the body's immune system and normally leads to opportunistic infections, malignancies, and ultimately death. But these symptoms do not appear all at once. In fact, "[i]ndividuals may carry HIV for several years without manifesting the collection of symptoms known as AIDS." *Ibid.* Persons with such "asymptomatic" HIV remain infectious, however. And, even during the "asymptomatic" period, the HIV virus continues to multiply and "create[] abnormalities in [their] blood and lymphatic systems. " *Id.* at 32a. HIV may be transmitted by intimate sexual contact with an infected person, by invasive exposure to infected blood, or from mother to child during pregnancy, birth, or breast feeding. J.A. 87, 103. Persons cannot contract HIV through casual contact with an infected individual. J.A. 103.

Both the Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Administration (OSHA) have addressed the question of how HIV-infected patients may be safely treated in dental offices. The CDC issued Recommended Infection-Control Practices for Dentistry in 1986 and revised recommendations in 1993. Pet. App. 181a-199a. It also issued Recommendations for the Prevention of HIV Transmission in Health Care Settings, including dentistry, in 1987. R. 53, Exh. 17. And OSHA issued a final rule on Occupational Exposure to Bloodborne Pathogens in 1991. 29 C.F.R. 1910.1030. Because health care workers cannot know with certainty whether they are treating an infectious patient, those guidelines dictate the use of "universal precautions"—infection control procedures under which every patient is treated as if the patient carries an infectious bloodborne pathogen (such as HIV or Hepatitis B). Pet. App. 183a; J.A. 88, 103-104. The procedures include protective attire and barrier techniques such as gloves, gowns, protective eyewear, surgical masks and/or face shields; proper sterilization of all dental instruments, including heat sterili-

zation of dental handpieces after each use; and proper disinfection of the dental unit and operatory surfaces. Pet. App. 185a-199a; J.A. 88-89, 103-105.

2. Respondent Abbott tested positive for HIV antibodies in 1986; she was, however, "asymptomatic" at that time and remained so at least until the time of the district court's judgment in 1995. Pet. App. 31a-32a. In September 1994, she arrived at petitioner's dental office for a prescheduled appointment. *Id.* at 3a. At the office, respondent was asked to fill out a medical questionnaire. She disclosed on that form that she had tested positive for HIV. *Ibid.*; see J.A. 48-51. After petitioner examined respondent and concluded that she had a cavity, he informed her that "pursuant to his infectious disease policy, he would not fill her cavity in his office." Pet. App. 3a. He stated that his policy was to treat people with infectious diseases in a hospital setting, although at that time he in fact did not have admitting privileges at any hospital and had never inquired about obtaining such privileges at any hospital. J.A. 31. Petitioner offered to treat respondent at a hospital at his regular fee, but informed her that she would have to pay "whatever the hospital charged for the use of its facilities." Pet. App. 3a. Respondent refused the offer. *Ibid.*

3. Respondent then filed this action, alleging that petitioner had violated Title III of the Americans with Disabilities Act, 42 U.S.C. 12181 *et seq.* (ADA), which prohibits public accommodations from discriminating on the basis of disability. See 42 U.S.C. 12182. The parties filed cross-motions for summary judgment on the issues of liability and the ADA's constitutionality. The district court granted respondent's motion for summary judgment and denied petitioner's. Pet. App. 31a-65a.[2]

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[2] The United States intervened in the district court to defend the constitutionality of the ADA and also participated as amicus curiae regarding other issues in the case. The district court ultimately granted summary judgment to Abbott with regard to petitioner's constitutional challenges to the application of the ADA, see Pet. App. 54a-62a, and petitioner did not renew those claims on appeal. The United States continued to participate as amicus curiae in the court of appeals with regard to the remaining, nonconstitutional issues in the case.

After Abbott amended her complaint to include a claim under the Maine Human Rights Act, the Maine Human Rights Commission intervened as a plaintiff. R. 14, 23. The district court found that petitioner's conduct violated the Maine Human Rights Act for the same reasons that it violated the ADA. Pet. App. 52a-54a.

Under the ADA, "[t]he term 'disability' means, with respect to an individual * * * a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. 12102(2). The court held that respondent was disabled under that definition. Relying in part on regulations promulgated by the Department of Justice, see 28 C.F.R. 36.104, the district court concluded "that asymptomatic HIV constitutes a physical impairment for the purposes of the ADA." Pet. App. 35a. The court also concluded that "[r]eproduction, one of the most fundamental of human activities, must constitute a major life activity." *Id.* at 37a. And the court found that respondent's HIV infection "substantially limits" that major life activity. *Id.* at 40a. That is because "an HIV positive mother runs the risk of infecting her child, during pregnancy, through childbirth or, if she chooses to do so, through breast feeding," and because respondent's HIV infection, by severely limiting her life expectancy, would likely limit her ability to engage in "the process of caring for and raising a child." *Ibid.* The court also noted respondent's "fear of harm to her immune system." *Ibid.*

Petitioner claimed that, even if respondent was disabled, he need not provide her with the needed dental treatment because such treatment would have posed a "direct threat"

to himself or others under 42 U.S.C. 12182(b)(3), which provides that one who furnishes services need not "permit an individual to participate in or benefit from [the provider's] services * * * where such individual poses a direct threat to the health or safety of others." 42 U.S.C. 12182(b)(3). The term "direct threat" is defined in the ADA as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services." *Ibid.* The district court held that "treatment of [respondent] in [petitioner's] office poses no direct threat to the health or safety of others." Pet. App. 51a-52a. Characterizing petitioner's evidence on this point as "conjecture", the court based its decision on "the current state of medical knowledge, * * * defer[ring] to the reasonable medical judgments of public health officials." *Id.* at 45a.

4. The court of appeals affirmed. Pet. App. 1a-30a. The court held "unhesitatingly that HIV-positive status, simpliciter, whether symptomatic or asymptomatic, comprises a physical impairment under the ADA." *Id.* at 6a. The court also held that reproduction is a "major life activity." The court explained that the "plain meaning of the word 'major' denotes comparative importance," and that "reproduction, which is both the source of all life and one of life's most important activities, easily qualifies under that criterion" as a major life activity. *Id.* at 8a. The court rejected petitioner's arguments that "an activity must be performed either frequently or universally before it can be classified as a major life activity." *Id.* at 10a. The court also noted that even if it assumed, favorably to petitioner, that respondent had to show that reproduction is a major life activity for her, see *id.* at 12a, "a fact finder could reach no conclusion other than that reproduction, if a major life activity at all, constitutes such for [respondent]," *id.* at 13a.

The court agreed with the district court that respondent's HIV infection "substantially limits" the major life activity of reproduction. The court noted that petitioner conceded "that an HIV-positive pregnant woman faces an approximately 25% risk of transmitting the virus to her child without AZT therapy and an 8% risk of viral transmission with such therapy." Pet. App. 14a. The court ruled that "[n]o reasonable juror could conclude that an 8% risk of passing an incurable, debilitating, and inevitably fatal disease to one's child is not a substantial restriction on reproductive activity." *Ibid.* The court further noted that "even if [respondent] gives birth to a healthy child, she probably will not live long enough to complete the task of raising the child to adulthood." *Id.* at 15a. The court therefore held that "HIV-positive status is a physical impairment that substantially limits a fecund woman's major life activity of reproduction," and that respondent is therefore "disabled" under the ADA. *Ibid.*

Finally, the court rejected petitioner's argument that providing routine dental treatment to respondent would pose a "direct threat" to himself or others. Relying in part on Department of Justice regulations, see 28 C.F.R. 36.208(c), the court noted that the presence or absence of a direct threat must be determined with respect to "an objective standard featuring the best evidence available at the time [the provider] refuse[s] to render treatment to disabled persons." Pet. App. 18a. The court held that the ADA requires "giv[ing] prima facie force to the views of public health authorities," while "permit[ting] a service provider to challenge those views based on contrary, properly supported opinions voiced by other recognized experts in the field." *Id.* at 21a. The court found that respondent had produced "competent evidence of reasonable medical judgments by public health officials, not contradicted by other public health authorities" that providing routine dental care to her "in an office environment does not pose a

direct threat to the dentist's health." *Id.* at 24a. The court ruled that each item of petitioner's evidence to the contrary "is too speculative or too tangential (or, in some instances, both) to create a genuine issue of material fact." *Id.* at 29a. In addition, the court concluded that, even taken together, petitioner's evidentiary proffers "are likewise insufficient * * * to call into legitimate question the lower court's entry of summary judgment." *Ibid.*

5. On November 26, 1997, this Court granted review limited to the first three questions presented in the petition for certiorari.

SUMMARY OF ARGUMENT

Respondent, who is infected with the HIV virus, has a "disability" covered by the ADA. There can be little dispute with the clear medical evidence that infection with the HIV virus constitutes an "impairment," from the time the virus enters the body and begins to attack the blood and lymphatic systems. Thus, HIV infection is a disability if that impairment "substantially limits" respondent in the conduct of a "major life activity." The court of appeals correctly held that it does.

Reproduction is a "major life activity." Congress's use of the term "major" requires an assessment of the relative significance or importance of an activity in human life. As the court of appeals held, the complex of activities constituting reproduction—including conception, birth, and child-rearing—is one of the most significant activities in which human beings engage. This Court has recognized that choices about whether to bear or beget children are "central to personal dignity and autonomy." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 851 (1992). While reproduction is not universal and is not engaged in with the same frequency as walking or breathing, it is the source of all human life and is indispensable to its perpetuation. For

all these reasons, it is a "major life activity" for human beings.

The ADA requires only that an impairment "substantially limit"—not entirely eliminate all possibility of engaging in—a major life activity. The court of appeals therefore correctly held that respondent's HIV infection substantially limits the major life activity of reproduction. The infection limits the conditions and manner under which she can become pregnant, because it makes unprotected intimate sexual relations life-threatening for her partner. The infection also would threaten the life of a child, since it can be passed from mother to child before or during birth or during breastfeeding. Finally, the infection limits reproduction—and other major life activities as well—by drastically shortening respondent's life expectancy and thereby limiting the likely duration of her ability to engage in childrearing.

The holding that HIV-positive individuals are covered under the ADA is compelled not only by the statutory text, but also by the statute's legislative history and administrative interpretations. The definition of "disability" is derived virtually verbatim from the Rehabilitation Act. That Act had been construed by both courts and the Department of Justice to cover asymptomatic HIV-positive individuals. When Congress chose to adopt the Rehabilitation Act coverage formula in the ADA, it was well aware of the results that had been reached under the Rehabilitation Act, and the committee reports expressly endorsed those results and approved similar coverage for HIV-positive individuals under the ADA.

The court of appeals also correctly held that an asymptomatic HIV-positive patient does not pose a direct threat to dental health care workers performing routine dental work. The Centers for Disease Control and numerous other professional organizations have concluded that, because a dental worker can never be certain whether a

given patient is a carrier of bloodborne or infectious diseases, universal precautions protecting against infection should be followed during all dental work. Those same organizations have concluded that, if such precautions are followed, it is safe to perform routine dental procedures on HIV-positive individuals. Such reasonable medical judgments, reached by those entrusted with the public health, are entitled to substantial deference. To rebut those judgments, petitioner was able to offer only unsupported conjectures and hypotheses. Accordingly, the court of appeals correctly held that performing routine dental work on respondent would not have posed a direct threat to petitioner or others.

ARGUMENT

I. ASYMPTOMATIC HIV INFECTION IS A "DISABILITY" UNDER THE AMERICANS WITH DISABILITIES ACT

An individual has a "disability" for purposes of the Americans With Disabilities Act if she has "a physical or mental impairment that substantially limits one or more of [her] major life activities." 42 U.S.C. 12102(2)(A). HIV infection clearly constitutes a physical "impairment," for it is a "physiological disorder or condition" that affects, among others, the "hemic and lymphatic" system. 28 C.F.R. 36.104 (definition of "disability," subpart (1)(i)).[3]

[3] Under 42 U.S.C. 12186(b), Congress required that "the Attorney General * * * issue regulations * * * to carry out the provisions of [Title III of the ADA]." Although the definition of "disability" is not in Title III, the definition does expressly apply to "this chapter," which includes Title III, and the definition is essential in construing and administering Title III. See, *e.g.*, 42 U.S.C. 12182(a) ("No individual shall be discriminated against on the basis of *disability* in [public accommodations].") (emphasis added). Accordingly, the Department of Justice regulations are entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

Department of Justice regulations implementing Title III of the ADA specifically list "HIV disease (whether symptomatic or asymptomatic)" as an example of an "impairment." *Ibid.* (definition of "disability," subpart (1)(iii)). See App., *infra*, 3a. The court of appeals noted that petitioner "does not seriously advocate an antithetical view," and held "unhesitatingly" that the status of being HIV-positive, "whether symptomatic or asymptomatic, comprises a physical impairment under the ADA." Pet. App. 6a (also citing cases). See also J.A. 55 (affidavit describing "abnormalities" present in asymptomatic HIV infected person).

The Department of Justice has also long taken the position that asymptomatic HIV infection is a disability under the ADA, either because it "substantially limits a major life activit[y]" of infected individuals or because the reactions of others to infected individuals cause such individuals to be treated as though they are disabled under the "regarded as" prong of the ADA's definition of "disability," 42 U.S.C. 12102(2)(C). See pp. 19-21 & n.12 *infra*; see also nn. 7, 16, *infra*. In this case, however, the courts below did not reach any question concerning major life activities other than reproduction that are limited by the HIV infection, and they did not address the "regarded as" test for disability. Both courts instead merely held that respondent's asymptomatic HIV infection substantially limits respondent's major life activity of reproduction. For the reasons given below, that conclusion should be affirmed.

A. Reproduction Is A "Major Life Activity" Under The ADA

1. a. The court of appeals correctly held that reproduction is a "major life activit[y]" under the ADA. Dictionary definitions, thoroughly canvassed by the court of appeals, uniformly make clear that "[t]he plain meaning of the

word 'major' denotes comparative importance" and that "the touchstone for determining an activity's inclusion under the statutory rubric ['major life activities'] is its significance." Pet. App. 8a. As the court noted, "reproduction, which is both the source of all life and one of life's most important activities, easily qualifies under that criterion." *Ibid.* Indeed, petitioner concedes (Br. 34) that "[o]bviously activities such as having sex, giving birth, changing diapers, and loving and educating one's children are activities of paramount importance to many Americans and in that sense are major life activities."

This Court's decisions have made clear the significance of reproduction in human life. Reproduction involves not only the act of conception, but also the physical processes facilitating conception, the ability to engage in sexual activity leading to conception without endangering oneself or one's partner, and the child-rearing and nurturing relationship following conception. "Our society has long recognized the fundamental importance of each element of this cluster of activities." Pet. App. 7a. The "decision whether to bear or beget a child," *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972), involves "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 851 (1992). Indeed, reproduction has been recognized as "one of the basic civil rights of man." *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942). The interests in raising one's children are similarly deep-rooted, see *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972), and decisions relating to procreation, reproduction, and childrearing are constitutionally protected. *Planned Parenthood*, 505 U.S. at 851.

The applicable regulations also support the conclusion that reproduction is a major life activity. Under Section 36.104, "[t]he phrase *major life activities* means functions such as caring for one's self, performing manual tasks,

walking, seeing, hearing, speaking, breathing, learning, and working."[4] As the wording of the regulation makes clear, that list is not exhaustive, but rather was intended to elucidate just how important an activity must be in order to be regarded as "major." Reproduction is clearly as important as many of the activities on that list, and therefore "fits comfortably within" the sweep of the regulation. Pet. App. 9a. Indeed, the same regulation defines "physical * * * impairment" to include "[a]ny physiological disorder or condition * * * affecting [the] reproductive [system]." 28 C.F.R. 36.104. To inquire whether a physiological disorder impairs the reproductive system is logically equivalent to asking whether it affects reproduction. Hence, if even a substantial limitation on reproduction were not covered under the ADA because reproduction is not a major life activity, then including reproductive disorders as "impairments" under the ADA would be entirely inefficacious; such impairments could never be relevant to a finding of disability under the ADA. Therefore, the regulation plainly contemplates that reproduction is a major life activity. See Pet. App. 9a; *Pacourek* v. *Inland Steel Co.*, 916 F. Supp. 797, 801-802 (N.D. Ill. 1996).

b. Petitioner argues (Br. 14) that "the focus of the ADA is on public, not private family life," and (Br. 29) that Congress in enacting the ADA was not "contemplating the obstacles faced by persons suffering from reproductive disorders, such as impotence and infertility." Congress, however, chose to use the term "major life activities" in the ADA, not some other term—such as "economically significant activities" or "activities in public life"—that would have been more susceptible to the construction petitioner urges. And, of course, the focus of the Act's protec-

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[4] This list is drawn from the regulations issued under the Rehabilitation Act of 1973. See 45 C.F.R. 84.3(j)(2)(ii) (defining major life activities).

tions remains on discrimination encountered in public life, rather than in private family life. For some categories of reproductive disorders, there may be little basis for concern that individuals with those disorders will suffer discrimination. In cases in which individuals with such disorders do suffer discrimination—as, for example, when the disorders are caused by an infectious agent and others react irrationally to fear of contagion—protection under the ADA fits well within the letter and purposes of the statute.

This Court in *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987), rejected an argument analogous to that which petitioner advances here. *Arline* was decided under the Rehabilitation Act, which defined covered ("handicapped") individuals in terms virtually identical to the definition of covered individuals (using the term "disability" instead) in the ADA. See 480 U.S. at 279. The plaintiff in that case was covered because she suffered from tuberculosis, a disease that in acute form substantially limited her respiratory system, *i.e.*, the "major life activity" of breathing. See *id.* at 281. Just as in this case, however, the plaintiff did not suffer discrimination because that major life activity was impaired. Instead, again as in this case, the plaintiff suffered discrimination because the defendant feared (irrationally) that the plaintiff's impairment would be contagious.[5] This Court held that such discrimination was within the ambit of the Rehabilitation Act: "Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other bene-

[5] See 480 U.S. at 281 n.6 (noting defendant's argument that adverse action was taken against plaintiff "not because of her diminished physical capabilities, but because of the threat that her relapses of tuberculosis posed to the health of others").

fits because of the prejudiced attitudes or the ignorance of others." 480 U.S. at 284. The same conclusion follows here.

c. Petitioner also contends (Br. 36) "that reproductive activities, for human beings, are largely moral and lifestyle choices, in contrast to walking, seeing, hearing, speaking, and breathing." For similar reasons, two district courts have held that reproduction is not a major life activity because it is not undertaken with the frequency of activities such as eating, walking, and breathing, and because not all people choose to do it. See *Krauel* v. *Iowa Methodist Medical Ctr.*, 915 F. Supp. 102, 106 (S.D. Iowa 1995), aff'd, 95 F.3d 674 (8th Cir. 1996); *Zatarain* v. *WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995), aff'd mem., 79 F.3d 1143 (5th Cir. 1996).[6]

[6] The vast majority of courts that have reached the issue have concluded that reproduction is a major life activity. See, *e.g.*, *Berk* v. *Bates Advertising USA, Inc.*, 1997 WL 749386, at *5 n.3 (S.D.N.Y. Dec. 3, 1997); *Hernandez* v. *Prudential Ins. Co.*, 977 F. Supp. 1160, 1164 (M.D. Fla. 1997); *Bielicki* v. *City of Chicago*, 1997 WL 260595, at *3 (N.D. Ill. May 8, 1997); *Soodman* v. *Wildman, Harrold, Allen & Dixon*, 1997 WL 106257, at *5 (N.D. Ill. Feb. 10, 1997); *Pacourek* v. *Inland Steel Co.*, 916 F. Supp. 797, 801-804 (N.D. Ill. 1996); *Erickson* v. *Board of Governors*, 911 F. Supp. 316, 320-323 (N.D. Ill. 1995); *Doe* v. *Kohn, Nast & Graf, P.C.*, 862 F. Supp. 1310, 1318-1321 (E.D. Pa. 1994); see also *McWright* v. *Alexander*, 982 F.2d 222, 226-227 (7th Cir. 1992) (under Rehabilitation Act); *Rivera* v. *Heyman*, 1997 WL 620837 (S.D.N.Y. Oct. 7, 1997) (under Rehabilitation Act); *Doe* v. *District of Columbia*, 796 F. Supp. 559, 568 (D.D.C. 1992) (under Rehabilitation Act); *Thomas* v. *Atascadero Unified School Dist.*, 662 F. Supp. 376, 379 (C.D. Cal. 1987) (under Rehabilitation Act); *Cain* v. *Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990) (construing same language under Pennsylvania Human Relations Act). Aside from *Krauel* and *Zatarain*, the only other court that has concluded that reproduction is not a major life activity is *Cortes* v. *McDonald's Corp.*, 955 F. Supp. 541, 545-546 (E.D.N.C. 1996). In *Runnebaum* v. *Nationsbank of Maryland*, 123 F.3d 156 (1997) (en banc), the Fourth Circuit recently addressed this issue, but no opinion was joined

Petitioner's contention is mistaken. Initially, insofar as reproduction includes raising one's children, it is an activity that may and often does occupy a large portion of a parent's waking life, particularly while the children are young. In any event, nothing in the statute suggests that an activity need be undertaken with any particular degree of frequency or universality in order to be considered "major." As the court of appeals noted (Pet. App. 8a), standard definitions of the term "major" refer to significance or importance, not frequency or universality. The perpetuation of human life qualifies. Moreover, the regulations list activities such as "working" or "learning" that would presumably be viewed as "moral and lifestyle" choices under petitioner's cramped definition. For example, many people—including the retired, those who choose to be full-time parents, and those who simply choose not to work—do not have employment. Nonetheless, even petitioner does not suggest that "working" is not a "major life activity."

B. HIV Infection "Substantially Limits" Respondent's Major Life Activity Of Reproduction

The court of appeals also correctly held that, at least for fertile women of childbearing age, HIV infection "substantially limits" engaging in the "major life activit[y]" of reproduction.[7] A person is "substantially limit[ed]" in an

by a majority of the judges. See *id.* at 170-171 (opinion of Williams, J.); *id.* at 183-185 (opinion of Michael, J., dissenting).

[7] In reviewing the judgments in this case, the Court need not address the effects of HIV infection on other major life activities. We note, however, that because HIV infection is an incurable and invariably fatal disease, it can be expected to substantially limit not only reproduction, but also many of the infected individual's other major life activities. HIV commences a process culminating in debilitating opportunistic infections and premature death. J.A. 55, 87. It limits all major activities by materially restricting the "duration under which" they can be performed. 28 C.F.R. Pt. 36 App. B, § 36.104, at 611. Even

activity if, "in comparison to most people," she is "restricted as to the conditions, manner, or duration under which" she can perform it. 28 C.F.R. Pt. 36 App. B, § 36.104, at 610-611. HIV infection limits the activity of reproduction because the HIV infection substantially limits the physical process of producing a healthy baby, and because it more generally limits a parent's ability to care for and raise the child by drastically limiting the length of time during which she can do so.[8]

1. Initially, a fertile woman's HIV infection limits her ability to become pregnant. As is by now well known, "[s]exual contact with exchange of body fluids constitutes the major risk factor for transmitting or contracting HIV infection." J.A. 87. The risk of such exchange can be greatly reduced by use of a condom.[9] Because the condom

long before it results in death, it limits marital choices, career choices (particularly those that require extensive training), and educational/learning options (by making long courses of study impractical). See also *State* v. *Clausen*, 491 N.W.2d 662, 666 (Minn. Ct. App. 1992) (difficulty of obtaining insurance); *Anderson* v. *Gus Mayer Boston Store*, 924 F. Supp. 763, 777 n.37 (E.D. Tex. 1996) (noting difficulty of travel because HIV-positive individuals "must be always mindful of exposure to bacterial infection and fungi or even places requiring vaccinations").

[8] Petitioner argues (Br. 16-27) that HIV infection is not a "per se" disability under the ADA. Compare *Ennis* v. *National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 60 (4th Cir. 1995) (ADA requires individualized proof that HIV-positive status substantially limits a major life activity). We agree that the statute requires the impairment to substantially limit the particular plaintiff, as the record establishes in this case. See Pet. App. 13a. At the same time, however, some impairments substantially limit the major life activities of large classes of persons—or even of all persons suffering from them. In our view, HIV-positive status falls within that category.

[9] See generally Myron S. Cohen, *HIV and Sexually Transmitted Diseases*, 98 Postgraduate Medicine 52, 63 & Table 2 (1995) (compiling studies dating from 1987-1989 and concluding that "condoms appear to be very effective in preventing the spread of HIV").

can also be expected to prevent pregnancy, respondent must take additional and special steps to become pregnant —steps that most other individuals need not undertake.

Even more significantly, respondent's HIV infection substantially limits reproduction because it would pose a substantial risk to the life of a child. Respondent "faces an approximately 25% risk of transmitting the virus to her child without AZT therapy and an 8% risk of viral transmission with such therapy." Pet. App. 14a.[10] Individuals without HIV infection do not face that risk. As the court of appeals recognized, "[n]o reasonable juror could conclude that an 8% risk of passing an incurable, debilitating, and inevitably fatal disease to one's child is not a substantial restriction on reproductive activity." *Ibid.*

HIV also substantially limits reproduction because, as the court of appeals noted (Pet. App. 15a), respondent likely would not live long enough to complete the task of

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[10] In our view, although the result would be the same regardless of which figure is used in the analysis, the 25% figure is the relevant one. Under Department of Justice and EEOC regulations, the determination of whether there is a substantial limitation of a major life activity "should be assessed without regard to the availability of mitigating measures, such as reasonable modifications or auxiliary aids and services." 28 C.F.R. Pt. 36 App. B, § 36.104, at 611 (DOJ regulations); 29 C.F.R. Pt. 1630 App., § 1630.2(j), at 351 (EEOC regulations). Even when an individual has been able to mitigate his or her disability by such measures, that individual remains subject to "deprivations based on prejudice, stereotypes, or unfounded fear." *School Bd. of Nassau County* v. *Arline*, 480 U.S. at 287. Because Congress intended to combat the use of such "stereotypic assumptions not truly indicative of the individual ability of [disabled] individuals to participate in, and contribute to, society," 42 U.S.C. 12101(a)(7), a narrow interpretation of the ADA that would withdraw coverage from such individuals would be inappropriate. The courts of appeals disagree regarding whether mitigating measures should be taken into account in determining whether an impairment amounts to a disability. See *Sutton* v. *United Air Lines, Inc.*, 130 F.3d 893, 901 & nn.7-8 (10th Cir. 1997) (citing cases).

raising a child if she chose to have one. Respondent was a 33-year-old woman at the time petitioner refused to provide her dental services. See Tr. 52 (deposition of respondent, May 16, 1995). As respondent herself testified, "the fact that [a] baby probably wouldn't have a mother after a while," Pet. App. 13a, necessarily imposed a severely limiting condition on her reproductive activity.

2. The ADA's definition of "disability"—including the term "major life activities"—was drawn virtually verbatim from the definition of the term "handicapped individual" in the Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111, 88 Stat. 1619, 29 U.S.C. 706. At the time Congress enacted the ADA, the lower courts had uniformly construed the Rehabilitation Act to cover asymptomatic HIV-positive individuals.[11] A formal Department of Justice legal opinion had concluded that the Rehabilitation Act "protects symptomatic *and asymptomatic* HIV-infected individuals against discrimination * * * on the basis of any actual, past or perceived effect of HIV infection that substantially limits any major life activity." See Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, to Arthur B. Culvahouse, Jr., Counsel to the President 1-2 (Sept. 27,

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[11] See *Doe* v. *Garrett*, 903 F.2d 1455, 1457 (11th Cir. 1990), cert. denied, 499 U.S. 904 (1991); *Cain* v. *Hyatt*, 734 F. Supp. 671, 677-678 (E.D. Pa. 1990) (under P.H.R.A.); *Baxter* v. *City of Belleville*, 720 F. Supp. 720 (S.D. Ill. 1989); *Thomas* v. *Atascadero Unified Sch. Dist.*, 662 F. Supp. 376 (C.D. Cal. 1987); *Ray* v. *School Dist. of Desoto County*, 666 F. Supp. 1524 (M.D. Fla. 1987). More recent cases under the Rehabilitation Act have agreed. See, *e.g.*, *Gates* v. *Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994); *Doe* v. *District of Columbia*, 796 F. Supp. 559, 568 (D.D.C. 1992); *Glanz* v. *Vernick*, 756 F. Supp. 632, 635 (D. Mass. 1991); cf. *Austin* v. *Pennsylvania Dep't of Corrections*, 876 F. Supp. 1437, 1465 (E.D. Pa. 1995); *Leckelt* v. *Board of Comm'rs of Hosp. Dist. No. 1*, 714 F. Supp. 1377, 1385-1386 n. 4 (E.D. La. 1989), aff'd, 909 F.2d 820 (5th Cir. 1990).

1988) (Kmiec Memorandum) (footnote omitted; emphasis added), *reprinted in Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 338-339 (1989). In reaching that conclusion, the opinion relied in part on the fact that HIV substantially limits the major life activity of reproduction (and of intimate sexual relationships). See Kmiec Memorandum 9-11.[12] When Con-

[12] The Kmiec memorandum stated that "we believe it is likely that the courts will conclude that asymptomatic HIV-infected individuals have an impairment that substantially limits certain major life activities." Kmiec Memorandum 10. Specifically, the memorandum stated that "we believe that it is reasonable to conclude that the life activity of procreation—the fulfillment of the desire to conceive and bear healthy children—is substantially limited for an asymptomatic HIV-infected individual." *Ibid*. The memorandum also stated that "some courts can be expected to find a limitation of a major life activity in the fact that an asymptomatic HIV-infected individual's intimate relations are also likely to be affected by HIV infection." *Id*. at 11. The memorandum noted that it may be argued that the HIV infection has not affected major life activities of individuals who have not changed their conduct as a result of the infection, but the memorandum reasoned that "in any case where the evidence indicates that the plaintiff HIV-infected individual has in fact changed his or her behavior—as, for example, where the plaintiff represents that procreation has been foregone—the court may well find a limitation of major life activity." *Ibid*. Finally, the memorandum noted that "courts may choose to pass over such factual questions since the Supreme Court has stated an alternative rationale for finding a life activity limitation based on the reaction of others to the infection." *Ibid*. With respect to that issue, the memorandum concluded that "the perceived impairment need not directly result in a limitation of a major life activity, so long as it has the indirect effect, due to the misperceptions of others, of limiting a life activity." *Id*. at 12.

Three years later, after enactment of the ADA, the Department of Justice promulgated its regulations interpreting the ADA. The Preamble to those regulations synthesizes the discussion in the Kmiec Memorandum to conclude that "asymptomatic HIV disease is an impairment that substantially limits a major life activity, either because

gress enacted the ADA two years later, the committee reports expressly stated that "a person infected with the Human Immunodeficiency Virus is covered under the first prong of the definition of the term 'disability' because of a substantial limitation to procreation and intimate sexual relationships," relying on the discussion in the Kmiec Memorandum. H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 52 (1990) (citing Kmiec memorandum); accord H.R. Rep. No. 485, *supra*, Pt. 3, at 28 n.18; S. Rep. No. 116, 101st Cong., 1st Sess. 22 (1989).[13]

When it adopted the coverage provision of the Rehabilitation Act for use in the ADA, Congress was thus fully aware that individuals with asymptomatic HIV were covered individuals under the Rehabilitation Act. Moreover, the legislative history of the statute expressly notes Congress's approval of the administrative construction to that effect. This Court has recognized that "[w]hen a Con-

of its actual effect on the individual with HIV disease or because the reactions of other people to individuals with HIV disease cause such individuals to be treated as though they are disabled." 28 C.F.R. Pt. 36 App. B, § 36.104, at 610. See App., *infra*, 6a. The Preamble goes on to explain that, for that reason, the regulations include "HIV disease (symptomatic or asymptomatic)" in the definition of "physical or mental impairment." See pp. 10-11, *supra*.

[13] Congress had studied the problem of discrimination against HIV-positive individuals in the process of drafting the ADA. The House and Senate committee reports, discussing the need for the legislation, noted that a Presidential Commission had "concluded that discrimination against individuals with HIV infection is widespread and has serious repercussions for both the individual who experiences it and for this nation's efforts to control the epidemic." H.R. Rep. No. 485, *supra*, Pt. 2, at 31; see also S. Rep. No. 116, *supra*, at 8. The reports noted the public health consequences of a failure to protect against such discrimination; individuals who fear discrimination "will be reluctant to come forward for testing, counseling, and care" and that failure "will undermine * * * efforts to contain the HIV epidemic." H.R. Rep. No. 485, *supra*, Pt. 2, at 31; S. Rep. No. 116, *supra*, at 8.

gress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and [the courts are] bound thereby." *United States* v. *Board of Comm'rs*, 435 U.S. 110, 134 (1978).[14] Petitioner's arguments that the terms of the ADA should be construed to leave such individuals outside the Act's protections should therefore be rejected.

3. Petitioner suggests (Br. 39-41) that HIV infection does not substantially limit reproduction within the meaning of the Act because it is the individual's reaction to the impairment, and not the impairment itself, that limits the activity. That distinction is immaterial. Petitioner's view appears to be that an impairment may be said to "substantially limit" a major life activity only if the impairment entirely eliminates the ability to engage in that activity, thus leaving no choice to the individual. There is no basis in the text, legislative history, or regulatory interpretation of the statute for that interpretation. In addition, as noted above, it is the physiology of the HIV virus—not any "choice" of respondent—that would threaten the life of a man engaging in unprotected intimate sexual activity with her, that would threaten the life of her child if she should become pregnant, and that substantially shortens her life expectancy. Regardless of whether respondent chooses to engage in reproduction under these conditions, the "major life activity" of reproduction is for her substantially limited "in comparison to most people."[15] 28 C.F.R. Pt. 36 App. B, § 36.104, at 611; see *Runnebaum*, 123 F.3d at 184-185 (Michael, J., dissenting).[16]

[14] Consistent with Congress's intent, most of the decisions addressing whether persons with asymptomatic HIV are protected by the ADA have agreed with the court below that they are, although they have relied on a variety of theories. See generally *Hernandez* v. *Prudential Ins. Co.*, 977 F. Supp. 1160, 1163-1165 (M.D. Fla. 1997) (discussing cases); *Hoepfl* v. *Barlow*, 906 F. Supp. 317, 319 n.7 (E.D. Va. 1995). In one case holding that an HIV infected person was not disabled under the employment provisions of the ADA, the court found that the plaintiff failed to establish that he had experienced any limitation as a result of the impairment. *Cortes* v. *McDonald's Corp.*, 955 F. Supp. 541, 546-547 (E.D.N.C. 1996).

[15] Petitioner states (Br. 41) that "[w]omen in abject poverty or violent neighborhoods confront in their reproductive decision-making risks just as significant that they and their babies will live short and miserable lives," and suggests that respondent should be treated no differently from such women. The comparison is inapt. Unlike those situations, the limitations on respondent's reproduction are the result of a physical impairment. As the ADA's definition of disability makes clear, it is such limitations—and not those that result from poverty or poor neighborhoods—that Congress sought to address in the ADA. See 28 C.F.R. Pt. 36 App. B, § 36.104, at 610 ("Physical or mental impairment" does not include "environmental, cultural, economic, or other disadvantages, such as having a prison record, or being poor.").

[16] For the reasons given above, we believe that, pursuant to the first prong of the ADA definition of disability, respondent was disabled because her HIV infection substantially limited a major life activity. If this Court were to disagree, however, the case should be remanded to resolve whether respondent is disabled under the third prong of the ADA definition of disability, which requires a showing that she was "regarded as having such an impairment." 42 U.S.C. 12102(2)(C). The court of appeals did not reach that issue, but respondent has stated that it was properly raised below. See Pet. App. 6a n.2; see also Br. in Opp. 4 n.4. Irrational exclusion of persons such as respondent from activities and services due to fear of contagiousness would establish that such persons are "regarded as" disabled under 42 U.S.C. 12102(2)(C). See H.R. Rep. No. 485, *supra*, Pt. 2, at 31; S. Rep. No. 116, *supra*, at 8, 24; *Cain* v. *Hyatt*, 734 F. Supp. 671, 678-680 (E.D. Pa. 1990).

II. AN ASYMPTOMATIC HIV-INFECTED PATIENT DOES NOT POSE A "DIRECT THREAT" TO DENTAL HEALTH CARE WORKERS FOLLOWING UNIVERSAL PRECAUTIONS WHEN PERFORMING ROUTINE DENTAL CARE

1. The ADA does not require a public accommodation to serve an individual who "poses a direct threat to the health or safety of others." 42 U.S.C. 12182(b)(3). In this context, "direct threat" means "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures." *Ibid.* As was true of a similar provision in the Rehabilitation Act discussed by this Court in *Arline*, such an exception serves the interest in "avoiding exposing others to significant health and safety risks." 480 U.S. at 287. At the same time, however, any test for determining whether an individual poses a "direct threat" must be carefully circumscribed "if [the Rehabilitation Act] is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear" (*ibid.*)—a goal shared by the ADA. See H.R. Rep. No. 485, *supra*, Pt. 2, at 53; *id.*, Pt. 3, at 30. To satisfy those concerns, the Court in *Arline* adopted a test that relied exclusively on objective factors regarding the risk and normally required deference to the judgments of public health officials. *Arline*, 480 U.S. at 288.

Congress included the "direct threat" exception in the ADA, and incorporated "the same standard as articulated by the Supreme Court in [*Arline*]." H.R. Rep. No. 485, *supra*, Pt. 3, at 45; accord *id.*, Pt. 2, at 76. The Department of Justice Regulations implementing Title III of the ADA similarly "codif[y] the standard first applied by the Supreme Court in [*Arline*]." 28 C.F.R. Pt. 36 App. B, § 36.208, at 626. In keeping with *Arline*, any determination that an

individual poses a "direct threat" must rely on "an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence." 28 C.F.R. 36.208(c). See App., *infra*, 4a-5a. That assessment must consider: "the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk." *Ibid.* To protect against the exclusion of individuals based on fear or stereotype, the "direct threat" provision requires the existence of a "significant" risk, "not a speculative or remote risk." H.R. Rep. No. 485, *supra*, Pt. 2, at 56. A showing that a plaintiff does not pose a direct threat does not require a showing that the plaintiff poses no risk, see *id.*, Pt. 3, at 46 (emphasis added) (citing *Chalk* v. *United States Dist. Court*, 840 F.2d 701, 707-708 (9th Cir. 1988)), for risks are inherent in daily life—particularly in a field like dentistry, where "[w]ell before the advent of HIV, [dental health care workers] were at risk of acquiring occupationally a number of diseases, from the common cold to potentially lethal Hepatitis B and TB." J.A. 107.

2. The Court in *Arline* stated that in making the necessary findings, "courts normally should defer to the reasonable medical judgments of public health officials." 480 U.S. at 288; see 28 C.F.R. Pt. 36 App. B, § 36.208, at 626; see also H.R. Rep. No. 485, *supra*, Pt. 3, at 45 ("Such risk of transmitting the infection to others must be determined based on objective and accepted public health guidelines."). The court of appeals interpreted that language (Pet. App. 21a) to mean that the views of public health officials are to be given "prima facie force," but that those views may be rebutted "by persuasive evidence adduced from other recognized experts in a given field." We agree. Under that rule, where, as here, the medical issue (*i.e.*, risk of contagion) is not within the expertise of the health care

provider (*i.e.*, the dentist), but rather is within the expertise of public health experts, there is no reason to defer to the views of the particular health care provider. Public health organizations and experts have the resources and expertise to evaluate the risk of infection; when they have examined the question and made the reasonable judgment that a practice can be engaged in safely, the courts should defer to that judgment—particularly where, as here, it is substantially unrebutted.

Reliance on such a specialized, objective judgment prevents decisions from turning on litigating adversaries' selective excerpts from medical materials, and therefore limits the risk that unjustified fears or stereotypes will distort the decision making process. Moreover, deference to the reasonable judgment of public health authorities is appropriate even if some uncertainties remain, for "[l]ittle in science can be proved with complete certainty." *Chalk*, 840 F.2d at 707. "Confronted with some uncertainties about scientific truth, judges, perhaps above all others, should act on the basis of that which *is* known, or, where this is not possible, on the basis of that which those best qualified to speak *say* is known." *Id.* at 712 (Sneed, J., concurring).

3. In this case, the court of appeals properly deferred to "those best qualified to speak" on the subject. Because petitioner did not demonstrate that the CDC's judgment was medically unreasonable, the district court properly granted summary judgment on the "direct threat" question.

The Centers for Disease Control and Prevention (CDC) has assessed the medical evidence concerning the risk that dentists can contract HIV from their patients. The CDC has adopted recommended infection-control practices—so-called "universal precautions"—for dentistry under which *all* patients are to be treated as if they carry an infectious or blood-borne disease such as HIV. Dentists cannot always know whether their patients carry such diseases—indeed, not all patients who carry infectious diseases know that they are infected. Refusing to treat the patients who both know that they are infected and inform the dentist of that fact is therefore not an effective way of reducing the risk. See J.A. 268, 274-275.[17]

The CDC has found the risk of HIV transmission in the dental context "so low as to be unquantifiable," and the universal precautions it recommends further reduce that already low risk. J.A. 283 (Declaration of then-Director of the Oral Health Program at the CDC); see also J.A. 268 (expert testimony that "the risk of infection to the health care worker [from a patient] is infinitesimally small, less than the risk of death involved in driving a car or being struck by lightning"). Although there have been very rare cases of transmission from patients to non-dental health care workers,[18] the precautions available to such workers

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[17] Indeed, one expert testified that adopting a policy of refusing to treat patients who acknowledge their infectious status "may actually be creating a more risky environment," since a dentist who "believ[es] he has eliminated a risk [in that manner] * * * may become less stringent in his practice of infection control." J.A. 274-275.

[18] As of December 31, 1994, the CDC was aware of 42 non-dental health care workers "documented as having seroconverted to HIV following occupational exposures to HIV"; 36 of these cases involved percutaneous exposures such as needlesticks. J.A. 106. Whether a needlestick injury leads to infection depends significantly on the amount of blood transmitted; the narrow-bore needles typically used in routine dentistry make it less likely that an amount of blood sufficient to cause infection will be transmitted in the dental context. J.A. 106-107. As Dr. Donald Marianos, then-Director of the Division of Oral Health at the CDC, explained, "[b]ecause the size of anesthetic needles used in dentistry is much smaller than that used in most medical settings, the majority of needlesticks among dental workers will involve smaller, rather than larger amounts of HIV infected blood. It is the position of the CDC that the risk of acquiring HIV occupationally from a needlestick in the dental setting is so low that it cannot be accurately quantified." J.A. 278-279. Moreover, the use of "instruments instead of

together with the nature of dental practice, explain why there has never been a documented case of HIV transmission from infected patient to dental health care worker.[19] Pet. App. 25a; see J.A. 56, 88, 106. The CDC thus has taken the position that "it is safe to provide dental care to patients with AIDS * * * in private dental offices when universal precautions are utilized." J.A. 284.

The CDC's conclusion is in accord with the positions of other professional and public health organizations, including the American Dental Association. J.A. 225.[20] That po-

fingers to retract tissue or guide anesthetic needles during injections" can reduce the risk of accidental dental needlestick incidents, and "self-sheathing anesthetic syringes are now available to prevent needlestick injuries during or after anesthetic injections." J.A. 270.

[19] We agree with the court of appeals that the medical evidence in cases of this type should be "confin[ed] * * * to that available at the time a dentist or other health-care professional refuses to treat." Pet. App. 18a (citing 28 C.F.R. 36.208(c)). Nonetheless, we are informed by the CDC that, as of the end of 1997, there remains no documented case of transmission of the HIV virus from a patient to a dental health care worker.

[20] Although the American Dental Association has filed an amicus brief in this Court in support of petitioner, it does not address the "direct threat" issue. The brief (at 2) does make clear, however, that it "does not in any way challenge or undermine longstanding Association policy concerning the safety of the dental office and/or the treatment of HIV-infected individuals." The brief reaffirms, therefore, that in light of the efficacy of universal precautions, "[p]atients with HIV infection may be safely treated in private dental offices when appropriate infection control procedures are employed," J.A. 225, and that "a patient's HIV/AIDS status is not a justification for refusal of treatment." Amer. Dental Ass'n Amicus Br. 2-3 n.2; see J.A. 225-226. Indeed, the Association's Council on Ethics, Bylaws and Judicial Affairs has stated that it is unethical to refuse treatment to those who are HIV infected. See J.A. 228 ("A decision not to provide treatment to an individual because the individual has AIDS or is HIV seropositive, based solely on that fact, is unethical."). Refusal to treat HIV-infected patients has similarly been declared unethical by the American Association of Oral and Maxillofacial Surgeons, J.A. 111, the Association of State and Territorial Health Officials and Association of State and Territorial Dental Directors, J.A. 125-126, and the American Association of Dental Schools, J.A. 134.

sition certainly constitutes a "reasonable medical judgment[]," *Arline*, 480 U.S. at 288, and is therefore entitled to deference from the courts. *Ibid.* See also *American Dental Ass'n* v. *Martin*, 984 F.2d 823, 828 (7th Cir.) (stating that the CDC's judgments regarding precautions to prevent the spread of bloodborne pathogens "are entitled to respect by the nonspecialist, biomedically unsophisticated Article III judiciary"), cert. denied, 510 U.S. 859 (1993). Because the probability of transmission in the course of routine dental care is so extraordinarily low (and would not in any event be eliminated), even the severe consequences of contracting HIV are not sufficient to establish the existence of a "significant risk to the health or safety of others." 42 U.S.C. 12182(b)(3).[21]

[21] Key differences between HIV-infected *doctors* and HIV-infected *patients* render the cases involving HIV-infected health-care workers inapposite. See, *e.g.*, *Doe* v. *University of Maryland Med. Sys. Corp.*, 50 F.3d 1261, 1265-1266 (4th Cir. 1995) (hospital did not violate ADA by suspending HIV-positive neurosurgical resident and offering him alternative residencies in nonsurgical fields); *Bradley* v. *University of Texas M.D. Anderson Cancer Ctr.*, 3 F.3d 922, 924-925 (5th Cir. 1993) (hospital did not violate Rehabilitation Act by reassigning HIV-positive surgical assistant to procurement department), cert. denied, 510 U.S. 1119 (1994). See also J.A. 107 (discussing the single case of transmission of HIV from dentist to six of his patients), C.A. App. 211-212 (same). The CDC has recommended that medical institutions make their own case-by-case determinations regarding whether particular HIV-infected health care workers can perform exposure-prone invasive procedures. See *University of Maryland*, 50 F.3d at 1266; *Bradley*, 3 F.3d at 924; *Leckelt* v. *Board of Comm'rs*, 909 F.2d 820, 828, 830 (5th Cir. 1990). Thus, although we take no position on the results reached on the facts of each of the cited cases, they are fully consistent with giving deference to the reasonable judgments of public health officials. In

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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addition, patients and doctors are not similarly situated. Since patients cannot control whether infected health care providers scrupulously employ universal precautions, patients bear all of the risk of transmission without having any ability to assure that the risk is minimized.

APPENDIX

STATUTORY AND REGULATORY PROVISIONS

1. 42 U.S.C. 12102 provides in pertinent part:

Definitions

* * * * *

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

* * * * *

2. 42 U.S.C. 12186 provides in pertinent part:

Regulations

* * * * *

(b) Other provisions

Not later than 1 year after July 26, 1990, the Attorney General shall issue regulations in an accessible format to carry out the provisions of this subchapter not referred to in subsection (a) of this section that include standards applicable to facilities and vehicles covered under section 12182 of this title.

3. 28 C.F.R. 36.104 provides:

For purposes of this part, the term—

* * * * *

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

(1) The phrase **physical or mental impairment** means—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine;

(ii) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

(iii) The phrase **physical or mental im-pairment** includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism;

(iv) The phrase **physical or mental impairment** does not include homosexuality or bi-sexuality.

(2) The phrase **major life activities** means functions such as caring for one's self, performing manual

tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) The phrase **has a record of such an impairment** means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) The phrase **is regarded as having an impairment** means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a private entity as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a private entity as having such an impairment.

4. 28 C.F.R. 36.208 provides:

(a) This part does not require a public accommodation to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of that public accommodation when that individual poses a direct threat to the health or safety of others.

(b) Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a

modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.

(c) In determining whether an individual poses a direct threat to the health or safety of others, a public accommodation must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.

5. 28 C.F.R. Pt. 36, App. B, provides in pertinent part:

Test A—A Physical or Mental Impairment That Substantially Limits One or More of the Major Life Activities of Such Individual

Physical or mental impairment. Under the first test, an individual must have a physical or mental impairment. As explained in paragraph (1) (i) of the definition, "impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs (including speech organs that are not respiratory, such as vocal cords, soft palate, and tongue); respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine. It also means any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. This list closely tracks the one used in the regulations for section 504 of the Rehabilitation Act of 1973 (see, *e.g.*, 45 CFR 84.3(j)(2)(i)).

* * * * *

It is not possible to include a list of all the specific conditions, contagious and noncontagious diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that other conditions or disorders may be identified in the future. However, the list of examples in paragraph (1)(iii) of the definition includes: Orthopedic, visual, speech and hearing impairments; cerebral palsy; epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

The examples of "physical or mental impairments" in paragraph (1)(iii) are the same as those contained in many section 504 regulations, except for the addition of the phrase "contagious and noncontagious" to describe the types of diseases and conditions included, and the addition of "HIV disease (symptomatic or asymptomatic)" and "tuberculosis" to the list of examples. These additions are based on the ADA committee reports, caselaw, and official legal opinions interpreting section 504. In *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), a case involving an individual with tuberculosis, the Supreme Court held that people with contagious diseases are entitled to the protections afforded by section 504. Following the *Arline* decision, this Department's Office of Legal Counsel issued a legal opinion that concluded that symptomatic HIV disease is an impairment that substantially limits a major life activity; therefore it has been included in the definition of disability under this part.

The opinion also concluded that asymptomatic HIV disease is an impairment that substantially limits a major life activity, either because of its actual effect on the individual with HIV disease or because the reactions of other people to individuals with HIV disease cause such individuals to be treated as though they are disabled. See Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), *reprinted in Hearings on S. 933, the Americans with Disabilities Act, Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources*, 101st Cong., 1st Sess. 346 (1989). The phrase "symptomatic or asymptomatic" was inserted in the final rule after "HIV disease" in response to commenters who suggested that the clarification was necessary to give full meaning to the Department's opinion.

* * * * *

Physical or mental impairment does not include simple physical characteristics, such as blue eyes or black hair. Nor does it include environmental, cultural, economic, or other disadvantages, such as having a prison record, or being poor. Nor is age a disability. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. However, a person who has these characteristics and also has a physical or mental impairment may be considered as having a disability for purposes of the Americans with Disabilities Act based on the impairment.

Substantial limitation of a major life activity. Under Test A, the impairment must be one that "substantially limits a major life activity." Major life activities include such things as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. For example, a person who is paraplegic is substantially limited in the major life activity of walking, a person who is blind is substantially limited in the major life activity of seeing, and a person who is mentally retarded is substantially limited in the major life activity of learning. A person with traumatic brain injury is substantially limited in the major life activities of caring for one's self, learning, and working because of memory deficit, confusion, contextual difficulties, and inability to reason appropriately.

A person is considered an individual with a disability for purposes of Test A, the first prong of the definition, when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. A person with a minor, trivial impairment, such as a simple infected finger, is not impaired in a major life activity. A person who can walk for 10 miles continuously is not substantially limited in walking merely because, on the eleventh mile, he or she begins to experience pain, because most people would not be able to walk eleven miles without experiencing some discomfort.

* * * * *

The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modifications or auxiliary aids and services. For example, a person with hearing loss is substantially limited in the major life activity of hearing, even though the loss may be improved through the use of a hearing aid. Likewise, persons with impair-

ments, such as epilepsy or diabetes, that substantially limit a major life activity, are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.